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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS MICHAEL WAGNER,

Defendant and Appellant.

2d Crim. No. B170762
(Super. Ct. No. F263041)
(San Luis Obispo County)

Thomas Michael Wagner appeals a judgment after a court trial committing him for two years as a sexually violent predator (SVP). (Welf. & Inst. Code, § 6600 et seq.)¹ Wagner contends the finding that he suffers from a current mental disorder is not supported by substantial evidence. We affirm.

FACTS

Wagner had been adjudged an SVP in 2000 and his commitment was due to expire in June of 2002. The People filed a petition to renew the SVP commitment in April of 2002, but the matter was not heard until late August and early September of 2003.

¹ All statutory references are to the Welfare and Institutions Code.

Doctor Hadley Osrán is chief of forensic psychiatry at Atascadero State Hospital (ASH). He testified he attempted to interview Wagner in February of 2002, but Wagner refused to be interviewed. Osrán evaluated Wagner using collateral sources of information. This included records dating back to 1974, prior SVP evaluations in 1997, 2000 and 2001, as well as Wagner's "current treatment record."

Osrán said Wagner was committed to the California Youth Authority in 1970 or 1971 for sexual perversion. Wagner also had adult convictions for sexual offenses with underage boys in 1973, 1984, 1985 and 1991.

Osrán testified that Wagner's recent history is more worrisome. Wagner is continuing to have sexual fantasies about minors. In 1999 and 2001, Wagner showed evaluators pictures of boys cut out of magazines. In an evaluation in 2001, he admitted that he masturbates to the pictures. He told the evaluator he did not believe that having sex with boys was molestation, and that molestation means raping a boy. Wagner told the evaluator that he was not interested in treatment because he did not want to let go of his fantasies. Osrán said the 2001 evaluation is very important in assessing Wagner's most recent mental state because that was the last time a professional interviewed him.

Osrán said that Wagner's clinical file indicated that he has not done much in treatment. He dropped out of his treatment program at the very beginning part of his active treatment. He is not on medications. Osrán said, "[T]here was basically really little to nothing that would suggest that he has had any change, based on the clinical record."

Osrán opined that Wagner suffers from a diagnosed mental disorder, pedophilia, which impairs his ability to control sexually violent sexual behavior. Osrán also opined that, if released, Wagner is likely to reoffend. Osrán testified that Wagner currently suffers from pedophilia. Osrán stated, "If you have a disorder for 30 years, I think it would still be active."

On cross-examination, Osrán said he prepared his report in March of 2002. He had not seen Wagner since February 28, 2002, when Wagner refused an interview.

Since that time, Osran has not reviewed hospital reports, 90-day treatment plans or "things like that."

Doctor Michael Rivard is a staff psychiatrist at ASH. He interviewed Wagner in February of 2002. He agreed with Osran that Wagner is a pedophile and an SVP. During the interview, Wagner admitted he is a pedophile, but claimed he is celibate. Wagner's treatment team said he had not changed his attitude about pedophilia and he does not think he needs treatment. Rivard opined that in the absence of effective treatment, Wagner's mental disorders will remain and will make him likely to reoffend if he is released.

On cross-examination, Rivard admitted that he had not reviewed any of Wagner's hospital records since February of 2002.

Defense

Doctor Theodore Donaldson, a clinical psychologist, testified that Wagner has a preference for adolescent males, but he is not "volitionally impaired" in acting on the preference. Wagner's preference for boys does not alone indicate that he suffers from pedophilia. Donaldson opined that Wagner does not have a "statutorily-defined mental disorder."

Wagner testified on his own behalf. He said he stopped treatment because the type of treatment offered would not help with the problem he had. He found the only thing that could help him was "spiritual work," so he contacted his church.

Wagner said he is not currently experiencing any "recurrent, intense, sexually-arousing fantasies" and has not had such an experience in a little more than two years. He admitted, however, that occasionally sexually aroused feelings and thoughts slip into his mind. When that happens, he prays and studies religious books and the thoughts go away.

DISCUSSION

I

Wagner contends there is no substantial evidence that he suffers from a current mental disorder.

We view the evidence in a light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We discard evidence that does not support the judgment as having been rejected by the trier of fact for lack of sufficient verity. (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1316.) We have no power on appeal to reweigh the evidence or judge the credibility of witnesses. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) We must affirm if we determine that any rational trier of fact could find the elements necessary for an SVP commitment beyond a reasonable doubt. (See § 6604; *People v. Johnson, supra*, at p. 578.)

Wagner argues that section 6600, subdivision (a)(3), requires that a SVP recommitment must be based on a "currently diagnosed mental disorder" He points out that Doctors Osran and Rivard had not interviewed him or reviewed hospital reports since February and March of 2002, some 19 or 20 months prior to the hearing. Thus Wagner concludes there is no substantial evidence that he currently suffers from a mental disorder.

But Wagner has a 30-year history of pedophilia. He has refused treatment and is not on medication. Rivard testified Wagner's problems would continue without treatment. Even in the absence of such testimony, no reasonable person would believe that someone with a 30-year history would be cured in 19 or 20 months without treatment. In fact, Wagner admitted he still had improper thoughts and feelings. The trier of fact was not required to believe he could suppress those thoughts and feelings with prayer and spiritual reading. There is ample evidence from which a trier of fact could conclude beyond a reasonable doubt that Wagner currently suffers from a mental disorder.

Wagner's reliance on *Butler v. Superior Court* (2000) 78 Cal.App.4th 1171, 1180, is misplaced. There the court determined that a petition for recommitment must be supported by new evaluations because, "[t]he evaluations performed at the initial commitment stage would not reflect the defendant's current mental condition." (*Ibid.*)

But the issue here is not whether the petition was supported by two new evaluations. Instead, the issue is whether the trial court's finding of a current mental

disorder is supported by substantial evidence. In deciding the issue of substantial evidence, we must look to the evidence as a whole. The age of the formal evaluations is not determinative.

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Barry T. LaBarbera, Judge
Superior Court County of San Luis Obispo

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Linda C. Johnson, Supervising Deputy Attorneys General, for Plaintiff and Respondent.